LEMBAGA KEMAJUAN TANAH PERSEKUTUAN

v.

MARIAM MANGU & ORS.

FEDERAL COURT, KUALA LUMPUR
SALLEH ABAS CJ (MALAYA)
HASHIM YEOP SANI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 160 OF 1983]
27 JANUARY 1984

TORT: *Negligence - Accident while at work - Claim by dependants - Liability - Defence - Act of God - No contractual relationship - Whether duty of care owed - Whether plaintiff trespasser or invite - Whether defendant occupier - Control and supervision - Whether with defendant - Proper construction of kongsi-house - Responsibility - Whether on defendant - Res ipsa loquitur - Applicability - Civil Law Act 1956, s. 7.*

Felda, a statutory authority, entered into an agreement with a firm ("the contractor") for the weeding and maintenance of one of its land schemes. The agreement contained a provision against sub-contacting without the written consent of Felda. Unknown to Felda, and without its permission, work was contracted to a sub-contractor, who employed a number of workers including one Nordin bin Abdullah ("the deceased"). The workers lived in a kongsi-house built on the scheme by either the contractor or the sub-contractor. One night the kongsi-house collapsed. The deceased was killed in the accident.

His dependants sued the contractor, the sub-contractor and Felda under s. 7 of the Civil Law Act, 1956 for loss of dependency and support. Judgment in default was entered against the first two defendants and Felda found liable and the deceased's dependants were awarded damages. Felda appealed against the finding of liability.

Held:

[1] There was no evidence upon which the defence of Act of God could stand.

[2] The consideration as to whether the deceased was employed in the scheme in breach of the contractor's agreement with Felda was irrelevant for the purpose of determining Felda's liability in tort. Tortious liability does not depend upon a contractual relationship but upon the question whether the injury was caused by the defendant's act or omission. (*Donoghue v. Stevenson* [1932] AC 562, 580; *Grant v. Australian Knitting Mill Ltd.* [1936] AC 85, 101 - 102 *Greene v. Chelsea Borough Council* [1957] 2 QB 127, 138; A.C. *Billings & Son Ltd. v. Riden* [1958] AC 240).

[3] The deceased was not a trespasser but an invite. He shared a common or joint interest with Felda, as his job was within the object for which Felda was established.

[4] Felda was still an occupier of the premises under the scheme. Under the contract with the contractor, the possession that was given to the contractor was only such as was reasonably necessary for the purpose of weeding and maintenance of the scheme. The contract, though irrelevant to determine the existence of duty, was relevant for the purpose of determining the nature of the duty of the defendant and its breaches. Under the contract, general control and supervision remained with Felda. There was nothing wrong in having more than one occupier in respect of one site or premises.

[5] Though Felda had not built the kongsi-house, it was liable for its collapse. It had allowed the kongsi-house to be erected, and though it had control and supervision of the scheme and as a statutory authority entrusted with social and economic responsibilities responsible for the well-being of the workers, it had done nothing to ensure compliance of the obligations undertaken by the contractor, and ensure that the kongsi-house was safe for the workers.

[6] The maxim *res ipsa loquitur* applied. In the absence of an explanation from Felda as to how the kongsi-house had collapsed, it must be concluded that the kongsi-house was unsafe for human occupation and that therefore Felda was guilty of negligence.

[Appeal dismissed.]

Cases referred to:
Donoghue v. Stevenson [1932] AC 562
Grant v. Australian Knitting Mill Ltd. [1936] AC 85
Greene v. Chelsea Borough Concil [1957] 2 QB 127
A.C. Billings & Son Ltd. v. Riden [1958] AC 240
Clay v. A.J. Cramp & Sons Ltd. [1964] 1 QB 533

Legislation referred to:
Civil Law Act 1956, s. 7

For the appellant - S. Kulasegaran (Tho Yow Leong with him); M/s. Ranjit Thomas and Kula
For the respondents - Christopher Foo; M/s. Murphy & Dunbar

JUDGMENT

Salleh Abas CJ (Malaya):

Felda is a statutory authority created by Land Development Ordinance 1956, whose object according to the long title is "to open and carry out projects for land development and settlement ..." in connection with its land Scheme at Sungai Retang, Jerantut, Pahang, it entered into a written agreement with a firm called Seng Kwee Company (referred to in this judgment as "the Contractor") on 26 March 1974 for the weeding and maintenance of the Scheme. The agreement contained a provision against sub-contracting in the following terms:

> 14. The Contractor shall not without the written consent of the Chairman first obtained assign this Contract or sub-contract all or any portion of the Works; provided that such consent shall not be unreasonably withheld to the prejudice of the Contractor. In the event of all or any portion of the Works being sub-contracted with the written consent of the Chairman the Contractor shall be solely and personally responsible for the due observance by such authorised sub-contractors of all the terms, stipulations and Conditions herein expressed.

Unknown to Felda, and without its permission, the work was subcontracted to one Hiew Pin Lee @ Siew Pin Leong (referred to as "the sub-contractor"). Amongst the workers employed by the sub-contractor was one Nordin bin Abdullah (the deceased). He and his fellow workers lived in a kongsi-house built on the Scheme by either the contractor or the sub-contractor.

On the night of 9 July 1974 the kongsi-house collapsed and the deceased was killed in that mishap. He left eight dependants, namely his widow and seven children, four of whom were very young. These dependants sued the contractor, the sub-contractor and Felda under s. 7 of the Civil Law Act 1956 (Revised-1972). Act 67, for loss of dependancy and support.

On the date of the trial the contractor and sub-contractor were missing. The contractor's Counsel who was present asked the Court for his discharge from the case. After this Counsel

had obtained the discharge and a judgment in default against the two missing defendants having been entered, the trial then proceeded against Felda, the remaining defendant.

The cause of action is liability under general doctrine of negligence in that Felda failed to provide a safe kongsi-house and also under a special subhead of negligence as an occupier/ owner of the Scheme.

The learned trial Judge held Felda liable and accordingly entered judgment for the deceased's dependants in the sum of RM28,000 of which RM7,000 was a pre-trial loss of dependency, plus interest which is at 4% per annum on the RM7,000 from the date of the service of the suit to the date of judgment and thereafter at 8% per annum on the total amount till realisation.

The appeal is only confined to the question of liability. Counsel for Felda submitted to us that the kongsi-house collapsed because of whirlwind. He, therefore, pleaded Act of God. We cannot accept this submission. We think that the finding of the learned trial Judge that there was no satisfactory evidence led on this point is correct and cannot be impugned. Mr. Bong Bon Kong, Felda's manager for this Scheme certainly had no personal knowledge of the matter. In his evidence he said this:

> I was told by my staff that there was a whirlwind at the vicinity of the Scheme.

This evidence is clearly hearsay and was therefore rightly rejected by the learned trial Judge. The next evidence which Counsel relied upon is a police report lodged by one Malayan s/ o Munusamy (Jerantut Police Report No. 757/74) to the effect that there was "the sound of loud wind and rain" in that night. But this document was not agreed to by the plaintiff. Therefore, nothing short of calling its reporter could make it admissible. Hence there is no evidence upon which the defence of Act of God could stand.

As to the issue of negligence, Felda did not know that the contractor in breach of the agreement with Felda had sub-contracted the work. Counsel for Felda, therefore, submitted that as the subcontract was unauthorized, the sub-contractor's employee, i.e. the deceased, must in the circumstances of the case be a trespasser and as such Felda owed him no duty of care at all.

With respect, we disagree. The submission seems to us to be an attempt to revive a notion which had long been discarded in that tortious liability depends upon contractual relationship and that since Felda and the deceased had no contractual relationship with each other, Felda therefore owed no duty of care to him at all.

This notion was abandoned in England by the House of Lords in *Donoghue v. Stevenson* [1932] AC 562 at 580, and it was, to paraphrase Professor Winfield, given a "decent burial" by the Privy Council in *Grant v. Australian Knitting Mill Ltd.* [1936] AC 85 at 101-102. An attempt to revive it was repelled by Lord Denning in *Greene v. Chelsea Borough Council* [1957] 2 QB 127 at 138. These cases establish that a person owes a duty of care even to persons who have no contractual relationship with him, and that his liability to an injured person depends upon whether the injury was caused by his act or omission. It is the nature of his act and omission that makes him liable. Thus a contractor who obstructed the normal approach to a house which he was engaged to reconstruct was held liable to a visitor of the house, when the latter was injured as a result of using a dangerous alternative access, despite the fact that the visitor had been informed of and appreciated the danger. (See *A.C. Billings & Son Ltd v. Riden* [1958] AC 240). The duty cast upon the contractor in this case was not derived from the contract between him and the owner of the house but one which is cast by law in that because of the danger created by him, he must take a reasonable care to ensure that visitors were not exposed to it.

Thus, in our view, the deceased in the instant appeal may well be employed in the Scheme in breach of Felda's agreement with the contractor and may be even regarded by it, as its Counsel said, as a trespasser, but this consideration is irrelevant for the purpose of determining Felda's liability in tort. Certainly, the presence of the deceased in the Scheme and the work he was doing did not render him an undesirable person. His job there was all for the benefit of Felda and was within the purpose of Felda's contract with the contractor and above all within the object of which Felda was established. The learned trial Judge was correct in holding that the deceased was not a trespasser but a person who entered upon the Scheme as an invite. After all an invite is a person who shares a common or joint interest with the occupier.

But Counsel submitted that even if the deceased was an invite, Felda was not an occupier because it had parted exclusive possession of the site to the contractor.

In order to deal with this question it is necessary to take into account Felda's position under the contract. Only after we consider the contract will we be able to say whether or not Felda had breached the duty of care which it owed to the deceased. The contract, whilst irrelevant to determine the existence of duty, is however relevant for the purpose of determining the nature of the duty and therefore its breaches. The rule is that whilst an injured person is not barred from getting a remedy because he is not a party to the contract, but to determine the question whether the defendant breaches the duty or not, the contract which he has signed is nevertheless relevant. (see *Clay v. A.J. Cramp & Sons Ltd.* [1964] 1 QB 533 and Winfield, 11th Edn. p. 69). Other Source Refered to:

According to the contract, possession of the site was given to the contractor "as complete as may be reasonably possible but not so as to constitute a tenancy" (Clause 24(b) of the agreement). Counsel for Felda submitted that because of this, the contractor had exclusive possession of the site and Felda, therefore, could not be held to be an occupier so as to render it liable to the deceased invite. We do not think that the expression we quoted above made Felda no longer an occupier. Felda retained a great deal of control under this contract. For example -

(1) Work had to be done in accordance with the direction and satisfaction of Felda's superintending officer (Clause 1(a)).

(2) The superintending officer was empowered to issue direction in his absolute discretion in regard to a number of matters, including

(i) prescribing the minimum number of labourers to be engaged; (ii) removal of unwanted materials brought in by the contractor; and (iii) dismissal of unwanted and undesirable workers [Clause. 1(a)(i), (ii) & (iii)].

(3) The superintending officer had access to the work. (Clause 9), and

(4) The superintending officer had power to ensure compliance with labour laws by the contractor, as regards wages, days and time of work, insurance and other matters.

The superintending officer is the manager of the Scheme and he is Mr. Bong Bon Kong.

In view of these provisions which show that not only the general control and supervision of the work but also the well-being of the labourers working in the Scheme were left with Felda, we think that Felda did not cease to be in possession of the site. After all an occupier is a person who has control over the relevant premises or site. If an owner demised his premises he certainly parted possession of it, but here the possession given was said to be

not as complete as to amount to a tenancy. This fact coupled with the general control and supervision which Felda had clearly indicate that Felda was also an occupier of the Scheme. There is nothing wrong in having more than one occupier in respect of one site or premises. This is an agricultural contract and it is common knowledge that besides weeding for which Felda entered into a contract with the contractor, there must be other works, such as planting, replanting, earth work, fertilising insecticiding etc. which were required to be done. In our view, the possession that was given to the contractor was only such as was reasonably necessary for the purpose of weeding and maintaining the Scheme. Felda, therefore, was still an occupier.

Now what duty did Felda as an occupier owe to the deceased invite? And, what duty did it breach?

The kongsi-house was not built by Felda, but it knew that it was there and therefore it must have known that labourers lived in it. Although Felda seemed rather indifferent to its existence, the kongsi-house was not illegally erected as the contractor was entitled to build it under Clause 3 of the Agreement, requiring the contractor to provide "everything necessary for the proper execution of the works". Provision for labourers' accommodation is surely one of the many things necessary for the proper execution of the works and therefore within the terms of this clause. Without the kongsi-house labourers could not be housed and without labourers works under the contract could not be performed. Thus, the erection and existence of the kongsi-house are for the common benefit of Felda, the contractors and the labourers.

Can Felda now turn round and say that it was not liable to the injured occupant because it did not build the kongsi-house? In our view, it cannot. Although Felda did not build it, it allowed it to be erected and used by the weeding labourers, whose work benefitted Felda, and although it had control and supervision of the Scheme and the well-being of the labourers, Felda did nothing to ensure that the kongsi-house was safe for them to live in. It only allowed it to exist and be used. We cannot accept this indifferent attitude as absolving Felda of its duty of care, especially when it is a statutory authority established by the legislature entrusted with social and economic responsibilities. In the discharge of these responsibilities Felda must be fully alive to the object and purpose for which it was established. In this case whilst it correctly retained control and supervision of the Scheme and the general well-being of the labourers, it did nothing to ensure compliance of the obligations undertaken by the contractor. In our view, this is not enough. It must go further and see that they are complied with.

The kongsi-house for unknown reason collapsed. No proper explanation was forthcoming from Felda. An attempt to show that it was caused by a whirlwind failed because the evidence is hearsay.

We therefore held that *res ipsa loquitur* applies in that the kongsi-house must have been unsafe for human occupation and Felda is, therefore, guilty of negligence.

That being the case the appeal is dismissed with costs. The deposit should be paid to the respondents.

Also found at [1984] 1 CLJ 225